**No. 17-1351**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, a project of the Urban Justice Center, Inc., on behalf of itself; HIAS, INC., on behalf of itself and its clients; MIDDLE EAST STUDIES ASSOCIATION OF NORTH AMERICA, INC., on behalf of itself and its members; MUHAMMED METEAB; PAUL HARRISON; IBRAHIM AHMED MOHOMED; JOHN DOES #1 & 3; JANE DOE #2,

*Plaintiffs – Appellees*,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF STATE; OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; REX W. TILLERSON, in his official capacity as Secretary of State; DANIEL R. COATS, in his official capacity as Director of National Intelligence,

*Defendants – Appellants*.

On Appeal from the United States District Court
for the District of Maryland, Southern Division
(8:17-cv-00361-TDC)

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# INTRODUCTION

Plaintiffs' response confirms that they cannot defend the decision below under well-settled and important rules: stigmatic injuries from government actions taken against third parties are not judicially cognizable; constitutional challenges to the federal government's exclusion of aliens abroad are subject at most to limited review for a facially legitimate and bona fide reason; the government and public suffer irreparable injury when the President's official acts are enjoined; and injunctive relief must go no further than necessary to redress cognizable injuries to particular individuals whose rights were violated. Plaintiffs' contrary arguments principally flow from a flawed notion of Establishment Clause exceptionalism: that they can evade the ordinary rules simply by labeling their challenge to the Order's treatment of certain aliens abroad—a temporary suspension of entry that was done to protect national security and makes no mention of religion—as a challenge to the Order's supposed anti-Muslim "message." The preliminary injunction should be vacated.

# ARGUMENT

## I. Plaintiffs' Challenge To Section 2(c) Is Not Justiciable

### A. Plaintiffs' Alleged "Condemnation" Injuries Are Not Cognizable

**1.** As the Supreme Court has "ma[de] clear," the general rule is that "the stigmatizing injury often caused by racial [or other invidious] discrimination * * * accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." *Allen v. Wright*, 468 U.S. 737, 755 (1984). Plaintiffs do not dispute that general rule; rather, they assert without explanation that religious stigma is distinguishable from the stigma caused by all other types of discrimination. Br. 20 n.7.

The Supreme Court, however, has flatly rejected that plea for Establishment Clause exceptionalism. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982) ("[W]e know of no principled basis on which to create a hierarchy of constitutional values or a complementary 'sliding scale' of standing."). It thus has applied the general rule against abstract stigmatic injury to Establishment Clause claims: regardless of "the intensity" of a plaintiff's feelings of aggrievement, "the psychological consequence presumably produced by observation of conduct with which one disagrees" is not the type of "personal injury" that confers Article III standing, "even though the disagreement is phrased in [Establishment Clause] terms." *Id.* at 485-86; *accord Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 606 (4th Cir. 2012).

Plaintiffs nevertheless assert (Br. 16-17, 20-22) that their Establishment Clause claim is different because Section 2(c) of the Order allegedly conveys a "message" that "condemns" Muslims. But the cases they cite did not create an exception to the general rule that abstract stigma is not a cognizable personal injury under the Establishment Clause. Rather, those cases all involved plaintiffs who effectively claimed that they themselves had been "subjected to unwelcome religious exercises," which is a personalized injury rather than an abstract objection. *Valley Forge*, 454 U.S. at 486 n.22. Specifically, those plaintiffs were all held to have been personally exposed to (1) an expressly religious official practice (2) that was directed towards them by their own local or state government.[1]

Here, neither element is present. Section 2(c) itself does not expose plaintiffs (or anyone else) to any religious message, because it says nothing about religion. And it is not directly targeted at plaintiffs in the way that local- or state-government messages are, because it directly applies only to aliens abroad from the specified countries. Plaintiffs refer (Br. 23 n.9) to their merits argument that "a policy need not facially single out a particular faith for disfavor in order to violate the Establishment Clause," but that is irrelevant to the *standing* rule that a policy may not be challenged by individuals who are not personally injured by it.

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[1] *See Suhre v. Haywood County*, 131 F.3d 1083, 1084-85 (4th Cir. 1997) (county resident had standing to challenge Ten Commandments display in main courtroom of county courthouse); *Moss*, 683 F.3d at 607 (public high-school student and parent had standing to challenge school policy that granted course credit for private religious education and was promoted to them in letter from parochial school); *Catholic League for Religious & Civil Rights v. City & County of San Francisco*, 624 F.3d 1043, 1047, 1052 (9th Cir. 2010) (en banc) (city residents had standing to challenge city resolution condemning certain actions and beliefs of Catholic Church); *Awad v. Ziriax*, 670 F.3d 1111, 1117-18, 1122-23 (10th Cir. 2012) (state resident had standing to challenge state constitutional amendment presented to voters that forbade state courts from considering "Sharia Law").

Plaintiffs do not meaningfully respond to *In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008), which expressly and persuasively refutes their theory: it would "eviscerate well-settled standing limitations" to allow a putative Establishment Clause plaintiff to "re-characterize[]" an abstract injury from "government *action*" directed against others as a personal injury from "a governmental *message* [concerning] religion" directed towards himself. *Id.* at 764. Plaintiffs assert (Br. 20) that *Navy Chaplaincy* involved "no condemnation injury," but the alleged injury there easily could have been so "re-characterized": certain Protestant chaplains claimed that the Navy was facially discriminating against other Protestant chaplains in favor of Catholic chaplains, yet the court still held that the plaintiffs there lacked Article III standing. 534 F.3d at 758-60, 764. Plaintiffs' attempt to recharacterize their injury is also irreconcilable with *Valley Forge*, because the plaintiffs' objection there to the federal government's transfer of property to a Christian college easily could have been recharacterized as an objection to the alleged "message" of "endorsement" of Christianity. *See* 454 U.S. at 466-68, 486-87.[2]

[2] There is no basis under Article III for distinguishing between endorsement and condemnation, because the content of the government's alleged message about religion is irrelevant to whether a plaintiff who objects to the perceived message has suffered a personal injury.

**2.** Plaintiffs try (Br. 20-23) to narrow their "condemnation" theory by emphasizing various facts that supposedly personalize their injury. None of them provides a principled limitation.

*First*, plaintiffs' assertion (Br. 21) that the Order subjects them to condemnation in their "own community" is no limit at all. By characterizing Section 2(c) as targeting their "community," even though it only suspends entry of aliens abroad, plaintiffs effectively are contending that any Muslim in the country can sue. *Cf*. Pltfs. Br. 23 n.10. This is contrary to the fundamental requirement that the challenged provision must impose a "concrete and particularized" injury on the individual challenger. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016).

*Second*, plaintiffs' observation (Br. 21-22) that the individual plaintiffs and many of the organizational plaintiffs' clients and members are "foreign-born" Muslims is irrelevant to the scope of the Order and their claim. Far from "singl[ing] out" or "target[ing]" foreign-born Muslims already in the country (*id*.), Section 2(c) does not address them at all: it is expressly limited to certain aliens abroad (and is based on those aliens' nationality, not their religion). Order §§ 2(c), 3(a).

*Third*, plaintiffs emphasize (Br. 23) their emotional distress about Section 2(c)'s potential effect on their ability to reunite with their relatives, but that is irrelevant to their "condemnation" theory of standing. Plaintiffs' concern about reuniting with their relatives is not "fairly traceable" to Section 2(c) unless they can show a cognizable threat that their relatives' entry will be delayed or denied. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1151 (2013). As demonstrated below, plaintiffs cannot make that showing.

### B. Plaintiffs' Alleged Injuries Based On Suspension Of Entry Are Not Cognizable

#### 1. Article III Bar

Plaintiffs ignore (Br. 25) that the threatened injury must be "certainly impending." *Clapper*, 133 S. Ct. at 1147. And even if a "substantial risk" were sufficient (Br. 25), plaintiffs' allegations are "too speculative for Article III purposes." *Clapper*, 133 S. Ct. at 1147.

**a.** The individual plaintiffs offer no record support for their speculation (Br. 26) that their relatives will likely be subject to Section 2(c)'s 90-day entry suspension. Plaintiffs correctly do not rely on Doe #2's sister, who is years away from potentially applying for and receiving a visa regardless of Section 2(c). Gov't Br. 19. Similarly, for Doe #3's wife, plaintiffs do not respond to the government's point that the nearly year-long delay since her visa-application interview suggests that (1) it is unlikely she would be found eligible for a visa during Section 2(c)'s 90-day window, and (2) it is likely her visa was denied given that consular officers must adjudicate the application at the time of the interview (subject to reconsideration). Gov't Br. 20. Likewise, for Doe #1's wife, plaintiffs speculate (Br. 26) that her visa-application interview "could be scheduled at any moment." But the "current processing times" they allege (*id.*) show how unreliable their speculation is: the six-to eight-week deadline allegedly given to Doe #1 passed more than six weeks ago, even though the Order has been enjoined (and would not have suspended the visa-adjudication process regardless). J.A.305; Gov't Br. 11, 19.

The individual plaintiffs also offer no record support for their speculation that Section 3(c)'s waiver process will not redress their alleged injuries. For instance, plaintiffs claim (Br. 27-28) that it is a "heavy burden" to satisfy the waiver criteria, but waivers for "close family member[s]" are expressly contemplated, and plaintiffs do not allege their relatives have requested waivers, much less been denied them. Gov't Br. 20. Similarly, although plaintiffs assert (Br. 28) that seeking a waiver could itself delay the process for the "many individuals affected by Section 2(c)" who "have *already* had their consular interview," that concern is not relevant for these plaintiffs: as discussed, the relatives of Does #1 and #2 have not yet had their visa-application interviews, and Doe #3's interview occurred nearly a year ago. Nor do plaintiffs identify any record support for their speculation (*id.*) that the waiver process for Does #1 and #2 could itself delay the visa application interview or extend beyond it.[3]

[3] Plaintiffs reprise (Br. 28-29) the district court's conclusion that they are "harmed" by the waiver process itself because they are "being confronted with a discriminatory barrier," but plaintiffs do not respond to the government's refutation of that claim. Gov't Br. 21-23; *infra* pp. 9-11.

**b.** The district court did not find that the organizational plaintiffs have standing, and they fail to show that they do. The organizations do not dispute the key point (Gov't Br. 25) that their alleged refugee-related injuries from the Order are irrelevant to the injunction, which does not cover Section 6's refugee restrictions. They simply string-cite their declarations (Br. 22 n.8, 26 n.12) without differentiating between injuries alleged from the refugee restrictions (which were the overwhelming focus of the declarations) and alleged injuries solely from the entry suspension (which were suggested in passing, if at all).

Indeed, the organizations have failed to identify any cognizable non-refugee-related injuries from the Order. IRAP and HIAS identify no client who has concrete and imminent plans to seek non-refugee admission, let alone one whose visa application is likely to be delayed or denied because of Section 2(c). Pltfs. Br. 26 n.12. MESA provides no evidence to support the asserted "reality" that a 90-day entry suspension starting in mid-March would have "ma[de] it difficult" for some of its members "to secure visas in time to make arrangements to attend" its annual meeting in mid-November—an assertion found nowhere in the cited declaration. *See id.* MESA also fails to identify any foreign students actually affected by Section 2(c)'s entry suspension (*id.*), and any decision by MESA members already in the country to forgo foreign travel (*id.*) is a "personal choice" that is not "fairly traceable" to Section 2(c)'s entry suspension, which does not apply to such individuals. *McConnell v. FEC*, 540 U.S. 93, 228 (2003).[4]

### 2. Prudential Standing Bar

Plaintiffs provide no meaningful response to the independent prudential-standing defect in their Establishment Clause claim. As the government explained (Br. 22-23), a plaintiff "generally must assert his own legal rights and interests," except in the limited circumstances where he has "third party standing to assert the rights of another." *Kowalski v. Tesmer*, 543 U.S. 125, 129-30 (2004). Plaintiffs here fail to satisfy that rule.[5]

Starting with the rule's exception, plaintiffs cannot assert an Establishment Clause claim on behalf of the third-party aliens abroad who are subject to Section 2(c), because those aliens lack any constitutional rights concerning entry to this country. Gov't Br. 22-23. Plaintiffs can assert an Establishment Clause claim only if their *own* rights under that Clause are being violated.

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[4] Likewise, plaintiffs fail to identify (Br. 22 n.8) any of their own resources that were diverted or lost because of Section 2(c)'s entry suspension, as opposed to Section 6's refugee provisions and the personal choices of the organizations, their members, and their clients (even if such a showing could establish standing).

[5] Although the rule has traditionally been framed as a "prudential standing" requirement, the Supreme Court has reserved the question whether it is better characterized as a limitation on the "right of action on the claim." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.3 (2014). Regardless of the label, plaintiffs here fail to satisfy the substance of this well-established rule.

They are not. Plaintiffs' own religious interests have nothing to do with their alleged injuries from any purported discrimination against the aliens abroad whose entry into this country they seek; indeed, the organizational plaintiffs have not even alleged that they are affiliated with Islam. Thus, plaintiffs' own religious-freedom rights are not implicated by how the Order treats aliens abroad seeking entry. *Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 207 (6th Cir. 2011) (en banc) (public-school teachers who sued school district for closing their specialized school and contracting with private religious school as replacement lacked "prudential * * * standing" under the Establishment Clause because they "d[id] not allege any infringement of their own religious freedoms," but rather "only economic injury to themselves"); *see Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15-18 & n.8 (2004) (non-custodial parent lacked prudential standing to challenge recitation of Pledge of Allegiance at his daughter's school because his "standing derive[d] entirely from his relationship with his daughter," despite his own resulting exposure to the Pledge); *Navy Chaplaincy*, 534 F.3d at 764-65 (noting that no precedent allows a plaintiff to "complain[] about employment discrimination suffered by other[] [co-religionists], not by the plaintiff himself").

Plaintiffs respond to these cases (Br. 19-20) by reprising their flawed assertion that Section 2(c) violates their Establishment Clause rights by "condemning" all Muslims. Although plaintiffs also suggest in passing (Br. 22 n.8) that *McGowan v.*

*Maryland*, 366 U.S. 420 (1961), held that an individual's own Establishment Clause rights can be violated even if the individual suffers only non-religious injuries from the violation, *McGowan* is inapposite: the challengers there were "direct[ly]" subjected to (indeed, prosecuted under) a Sunday-closing law that regulated their own conduct. *See id.* at 422, 430-31. In contrast, plaintiffs here merely object to the alleged indirect effects on themselves from Section 2(c)'s application to others. *McGowan* reaffirmed that indirectly injured individuals ordinarily lack standing to challenge religious discrimination against third parties under the Free Exercise Clause, and explained that bringing the same substantive third-party religious-discrimination claim under the Establishment Clause label does not alter the normal standing rule. *See id.* at 429-30.

**3. Consular-Nonreviewability Bar**

Finally, in response to the government's showing (Br. 26-27) that consular-nonreviewability principles also foreclose their claims, plaintiffs suggest (Br. 29) that those principles are inapplicable because this is a challenge to a "categorical polic[y]," not a "particular consular officer's decision." But that approach would turn consular nonreviewability upside-down by granting individual officers greater immunity from judicial review than the President, the Secretary of State, or Congress. Consular nonreviewability is premised on the broader principle that "any policy toward aliens" is "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159-60 (D.C. Cir. 1999). The doctrine at most has a limited exception (inapplicable here) for a U.S. citizen whose own constitutional rights allegedly are violated by an alien's challenged exclusion. *See id.* at 1163-64.

## II. Plaintiffs Are Not Likely To Succeed On The Merits

### A. Section 2(c) Is A Valid Exercise Of The President's Statutory Authority

Plaintiffs contend (Br. 44-49) that Section 2(c) exceeds the President's statutory authority. Plaintiffs, however, make no substantial argument that the President lacked affirmative statutory authority under 8 U.S.C. §§ 1182(f) and 1185(a)(1) to adopt Section 2(c). *Cf.* Gov't Br. 28-30. Their only response to the President's broad authority to "suspend" the "entry" of "any class of aliens" is the cursory assertion that Section 1182(f) does not "authorize religious discrimination," Br. 45, but that adds nothing to their constitutional challenge. Moreover, plaintiffs do not dispute that the President's authority under Section 1185(a)(1) to prescribe "rules," "regulations," "limitations," and "exceptions" regarding entry generally authorizes suspending entry of certain aliens.

Instead, plaintiffs' principal statutory argument (Br. 45-49) is that Section 2(c)'s temporary suspension of entry of certain nationals of six countries violates 8 U.S.C. § 1152(a)(1)(A)'s prohibition on nationality-based distinctions in "the issuance of an immigrant visa." That narrow argument cannot justify the broad injunction granted, and the argument is incorrect even on its own terms.

*First*, plaintiffs' Section 1152(a)(1)(A) argument implicates only a subset of the aliens subject to Section 2(c), and it thus cannot support the district court's sweeping injunction barring any enforcement of Section 2(c). As the district court recognized, Section 1152(a)(1)(A) applies only to immigrant visas. J.A.790-91, 793. That provision therefore cannot support the injunction, which bars any enforcement of Section 2(c)—including as to the large majority of aliens from the six countries who seek *nonimmigrant* visas. J.A.814; Gov't Br. 32-34. Plaintiffs' undeveloped assertion (Br. 47 n.22) in a footnote that Section 1152(a)(1)(A) "bans discrimination with respect to nonimmigrant visas" is forfeited, *Unspam Techs., Inc. v. Chernuk*, 716 F.3d 322, 330 n.* (4th Cir. 2013), and in any event foreclosed by the statutory text.

*Second*, plaintiffs' statutory argument is incorrect even as to immigrant visa applicants. As the district court correctly held, Section 1152(a)(1)(A) concerns only issuance of immigrant visas; it does not apply to suspensions on entry. J.A.790-91, 793; Gov't Br. 30-34. Plaintiffs argue (Br. 47) that Section 2(c) does not actually regulate "entry" because its implementation affects issuance of visas. But Section 2(c) "suspend[s]" "the *entry* into the United States of nationals of [the six] countries"—action that Section 1182(f) expressly authorizes—subject to exceptions and waivers. Order § 2(c) (emphasis added). Section 1152(a)(1)(A) has nothing to say about that valid suspension of entry of certain aliens.

Plaintiffs argue (Br. 47) that Section 1152(a)(1)(A) supersedes Section 1182(f): if the alien is supposedly eligible for a visa, the President may not suspend his entry. Rather than read the provisions to "conflict," this Court should "reconcil[e]" them by holding that Section 1152(a)(1)(A) leaves the President's suspension authority intact. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976). And even if they conflicted, Section 1182(f) would "govern[]" because its special grant of power to the President to suspend entry if he makes particular findings is more "specific" than Section 1152(a)(1)(A)'s default rule. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2070-71 (2012). Section 1152(a)(1)(A) did not partially "repeal[]" that existing authority "by implication." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662, 664 n.8 (2007).

The only remaining question is whether the government must grant immigrant visas to aliens who may be validly denied entry upon arrival at the Nation's borders. The obvious answer is no. If an alien covered by Section 2(c) does not obtain a waiver and is denied a visa, it is not because of his nationality, but because he has been lawfully barred from entering the country by a Section 1182(f) suspension. Plaintiffs' response (Br. 48) that this would allow Section 1182(f) to "override *any* of the INA's visa criteria or inadmissibility grounds" misunderstands what Section 2(c) does. It does not alter visa-eligibility criteria or inadmissibility grounds; it merely "suspend[s]" entry of a "class of aliens" regardless of whether they otherwise are admissible. Plaintiffs never confront the State Department's practice of treating aliens covered by Section 1182(f) suspensions as ineligible for visas. *Cf.* Gov't Br. 33. Nor do they grapple with the practical consequences of their interpretation—namely, the difficulties and confusion that would result from issuing immigrant visas to aliens abroad only to deny those aliens entry upon arrival.[6]

Regardless, even assuming that Section 1152(a)(1)(A) were relevant, Section 1152(a)(1)(B) contains an exception for "procedures for the processing of immigrant visa[s]." Plaintiffs assert (Br. 49) that Section 1152(a)(1)(B) preserves only the Secretary of State's authority, but they do not address the fact that it is State Department personnel who would implement Section 2(c)'s suspension by refusing visas to covered aliens who do not receive waivers. Gov't Br. 34 n.12. Plaintiffs also deny (Br. 49) that Section 2(c) regulates procedures, but they fail to refute the government's showing that both Section 2(c)'s operation (temporarily pausing

[6] Plaintiffs cite (Br. 46-47) *Olsen v. Albright*, 990 F. Supp. 31 (D.D.C. 1997), and *Legal Assistance for Vietnamese Asylum Seekers v. Department of State, Bureau of Consular Affairs*, 45 F.3d 469 (D.C. Cir. 1995), *vacated on other grounds*, 519 U.S. 1 (1996) (per curiam), but neither case involved Section 1182(f).

entry) and its purpose (facilitating review of procedures to protect national security) concern procedural matters. Gov't Br. 33-34.

### B. Section 2(c) Does Not Discriminate On The Basis Of Religion

#### 1. *Mandel* governs plaintiffs' challenge to Section 2(c)

Plaintiffs do not defend the district court's view that the standard set forth in *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972)—whether the Executive's denial of entry of aliens abroad is for a "facially legitimate and bona fide reason"—applies only to consular officers' decisions, not decisions at the "highest levels of the political branches." J.A.806; *cf.* Gov't Br. 39-40. Plaintiffs do embrace (Br. 37) the court's view that *Mandel* "most typically applie[s]" to "individual visa denials," not broader policy decisions. But the Supreme Court, this Court, and others have applied *Mandel*'s test to broad policies. *See Fiallo v. Bell*, 430 U.S. 787, 792-96 (1977); *Johnson v. Whitehead*, 647 F.3d 120, 127 (4th Cir. 2011); *Rajah v. Mukasey*, 544 F.3d 427, 438-39 (2d Cir. 2008).

Plaintiffs dismiss *Fiallo* (Br. 37-38) because the alleged discrimination was clear "on the face of the statute," but that only confirms *Mandel* applies here. Given that *Mandel* governs claims of overt discrimination, *a fortiori* it controls plaintiffs' claim that the facially neutral Order was adopted for an improper purpose. Plaintiffs also assert (Br. 38) that, unlike the law in *Fiallo*, which concerned "line-drawing about family ties," the Order "condemn[s] certain religions." But that assumes the conclusion that the Court may "look behind" the Order's facially neutral criteria and its explicitly secular, national-security objective to infer an improper aim, which is exactly what *Mandel* forbids. 408 U.S. at 770. Plaintiffs never try to distinguish *Johnson*. And although they assert (Br. 37 n.18) that in *Rajah* there was no evidence of religious animus, plaintiffs do not contest that *Rajah* applied *Mandel*'s test.

Plaintiffs' primary argument (Br. 35-37) is that Establishment Clause claims are uniquely exempt from *Mandel*'s test. That invented exception has no basis in principle or precedent. Plaintiffs contend (Br. 35) that the Supreme Court has not previously applied *Mandel* to Establishment Clause claims. But they do not dispute that the Supreme Court and this Court have applied it to claims that exclusion of aliens violated the First Amendment (in *Mandel*) or reflected unconstitutional discrimination (in *Fiallo* and *Johnson*). Plaintiffs argue (Br. 35-36) that their Establishment Clause claim differs because it challenges not the refusal of particular visas, but a purported religious message. But plaintiffs are challenging, and obtained an injunction against, Section 2(c)'s suspension of entry of aliens abroad. *Mandel* applies to all constitutional challenges to the denial of entry of aliens abroad, whatever the reason why plaintiffs claim those aliens should be admitted.

Plaintiffs further argue (Br. 36-37) that their claims should be exempt from *Mandel* because the Establishment Clause is a "structural restriction" on government action. Their contention that Establishment Clause claims are immune from ordinary standards for reviewing constitutional claims is wrong. The Clause "establishes a norm of conduct which the Federal Government is bound to honor—to no greater or lesser extent than any other inscribed in the Constitution." *Valley Forge*, 454 U.S. at 484. Challenges under it are subject to the same "traditional presumption in favor of the constitutionality of statutes" as other constitutional claims, *Bowen v. Kendrick*, 487 U.S. 589, 617 (1988); *see Lovelace v. Lee*, 472 F.3d 174, 198 (4th Cir. 2006), and the same justiciability principles generally apply. *Supra* pp. 1-4, 10-11. It also would be illogical to apply different standards to religious-discrimination claims depending on whether they are pleaded under the Establishment Clause or the "inextricably connected" Free Exercise Clause. *Larson v. Valente*, 456 U.S. 228, 245 (1982). Plaintiffs' proposed Establishment Clause exception should be rejected.[7]

**2. *Mandel* precludes discrediting Section 2(c)'s stated purpose based on extrinsic material**

Plaintiffs alternatively argue (Br. 38-39) that *Mandel* itself requires the Court to probe whether the Order's stated purpose was given in "bad faith." *Mandel* makes

[7] None of plaintiffs' cases (Br. 36-37) held otherwise. They did not involve immigration, *Engel v. Vitale*, 370 U.S. 421 (1962) (school prayer); *Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406 (8th Cir. 2007) (sectarian prison-rehabilitation services); did not involve religion, *INS v. Chadha*, 462 U.S. 919 (1983) (one-House legislative veto of decision not to deport alien); or did not involve either, *Bond v. United States*, 564 U.S. 211 (2011) (Tenth Amendment challenge to criminal prosecution).

clear, however, that determining whether a policy decision rests on a "facially legitimate and bona fide reason" does *not* include "look[ing] behind" that reason. 408 U.S. at 769-70. Courts can ensure that the stated rationale is valid and consistent with the government's action, but *Mandel* precludes searching for ulterior motives in extrinsic material. *Id.* This Court and others have characterized *Mandel*'s test as "rational basis review." *Johnson*, 647 F.3d at 127 (collecting cases). Under the rational-basis standard, what matters is whether the government "reasonably could have believed that [its] action was rationally related to a legitimate governmental interest"; "[t]he actual motivation[s] for [its] actions are irrelevant." *Tri-Cty. Paving, Inc. v. Ashe County*, 281 F.3d 430, 439 (4th Cir. 2002).

Plaintiffs cite (Br. 39) Justice Kennedy's concurrence in *Kerry v. Din*, 135 S. Ct. 2128 (2015), which stated that an "affirmative showing of bad faith on the part of [a] consular officer" denying a visa, "plausibly alleged with sufficient particularity," could overcome the deference due under *Mandel*. *Id.* at 2141. *Din* is inapposite here because plaintiffs' own Establishment Clause rights are not violated by the refusal of visas to aliens abroad. *Supra* pp. 9-11. In any event, even if courts may consider claims of bad faith in individualized decisions by consular officers, that would not warrant second-guessing a formal national-security determination by the President. Plaintiffs never confront the Supreme Court's holding that, when "[t]he Executive * * * deem[s] nationals of a particular country a special threat," "a court would be ill equipped to determine the[] authenticity and utterly unable to assess the[] adequacy" of that determination. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999). Their invitation to disregard the President's risk assessment and policy judgment (*e.g.*, Br. 7 n.2, 9-10) flouts that clear rule. Moreover, the President demonstrated *good faith* by revising the Revoked Order in part to address concerns raised by courts. Gov't Br. 38-39.

### 3. Plaintiffs' Establishment Clause claim fails on its own terms

**a.** Even if domestic Establishment Clause precedent applies, plaintiffs concede (Br. 30) that the Order is valid if it is "neutral[]" with respect to religion—*i.e.*, if it does not "officially prefer[]" one or more religions (or religion generally). They cite nothing in Section 2(c), however, that reflects any official preference regarding religion or shows its stated national-security objective to be "secondary" or a "sham." *McCreary County v. ACLU*, 545 U.S. 844, 865 (2005). Plaintiffs cite a separate section (not challenged here) directing federal agencies to collect data regarding "acts of gender-based violence against women, including so-called 'honor killings,' in the United States by foreign nationals." Order § 11(a)(iii). But "[h]onor crimes are not specific to any religion[,] nor are they limited to any one region of the world." Human Rights Watch, *HRW World Report 2001: Women's Rights, Item*

*12 – Integration of the Human Rights of Women and the Gender Perspective* (Apr. 6, 2001), http://pantheon.hrw.org/legacy/press/2001/04/un_oral12_0405.htm.[8]

Plaintiffs principally rely on campaign and other statements by the President and aides. Br. 32-33, 42-43. But they offer no valid justification for looking beyond "the 'text, legislative history, and implementation of the statute,' or comparable official act." *McCreary*, 545 U.S. at 862-63. The cases plaintiffs cite only confirm the limited scope of the proper inquiry. In *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), it was "undisputed" that the legislature knew when it created a special school district that its boundaries were drawn specifically to include only members of one religious sect. *Id.* at 699 (plurality opinion); *id.* at 729 (Kennedy, J., concurring in the judgment) (law constituted "explicit religious gerrymandering"). Likewise, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), addressing a free-exercise claim, held that the local ordinances' "text" and "operation" showed that they were a religious "gerrymander." *Id.* at 536.

Plaintiffs assert (Br. 40, 43) that *McCreary* and *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003), support a much more wide-ranging inquiry, but they misread those decisions. Both concerned explicitly religious Ten Commandments displays, and the displays' religious purpose was explicitly confirmed by official pronouncements. Gov't Br. 47-48, 52. Plaintiffs note (Br. 40) that *McCreary* considered "testi[mony]" by the county executive's pastor who "accompanied" him at an official "ceremony for posting the framed Commandments." 545 U.S. at 869. But the executive made his pastor's statements part of the official proceedings; the inclusion of those statements thus reflected an official purpose "to emphasize and celebrate the Commandments' religious message." *Id.*; *see Green v. Haskell Cty. Bd. of Comm'rs*, 568 F.3d 784, 802 (10th Cir. 2009) (considering public statements by county commissioners about a Ten Commandments display that did not "distinguish between the [government's] position and [the officials'] own beliefs").

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[8] Plaintiffs assert in passing (Br. 31 n.16) other Establishment Clause and equal protection claims that the district court did not address. Plaintiffs forfeit these arguments by not developing them, *see Unspam*, 716 F.3d at 330 n.*, and in any event these arguments fail in substance for the same reasons as plaintiffs' primary arguments.

Plaintiffs also fail to justify relying on campaign statements to impugn the motive of subsequent government action. *Cf.* Gov't Br. 52. Aside from *Glassroth*—where Alabama's chief justice expressly confirmed the display's religious purpose after taking office, 335 F.3d at 1284-85, 1297—plaintiffs cite (Br. 40-41, 43) only *Epperson v. Arkansas*, 393 U.S. 97 (1968). In *Epperson*, though, it was undisputed that Arkansas's law banning the teaching of evolution could not be "justified by considerations of state policy other than the religious views of some of its citizens." *Id.* at 107. Moreover, the law was adopted by voters directly through the initiative process. *Id.* at 109 (Black, J., concurring); Brief for Appellants at 6, *Epperson*, 393 U.S. 97 (No. 67-7), 1968 WL 112570. The materials *Epperson* discussed thus are not analogous to a candidate's campaign-trail comments, and if anything are more akin to legislative history. Plaintiffs cite no precedent for discrediting a government policy's official purpose based on a candidate's campaign statements.

**b.** Plaintiffs argue (Br. 42-43) that "post-election statements" by the President and aides demonstrate an impermissible purpose. That claim collapses on inspection. Plaintiffs repeatedly assert that the President's campaign website has "called for 'preventing Muslim immigration.'" Br. 42 (quoting J.A.346); Br. 1, 3, 33. But they quote an archived campaign press release dated December 7, 2015. J.A.346. Plaintiffs also cite (Br. 42) language in the Revoked Order prioritizing refugee claims of members of religious minorities, but as the Order explains, that language did not reflect religious bias, Order § 1(b)(iv), and in any event the Order omits it to eliminate any possible misunderstanding.

Plaintiffs also allege (Br. 7, 42) that statements by the President and aides during the period between the Revoked Order and the Order—describing the Order as pursuing "the same basic policy outcome," J.A.579, reflecting the same "principles," J.A.379, or constituting a "watered down version" of the Revoked Order, Br. 7 n.1—show that the Order's purpose was unlawful. But as the Order explains, both Orders aimed at the same national-security objective of facilitating a review of existing screening and vetting procedures. Order § 1(b)-(i). The Order pursues that objective through substantially revised provisions; the differences are clear on the Order's face. Gov't Br. 8-11.

Plaintiffs further argue that two ambiguous remarks by the President (one before he took office) signal an improper motive. Br. 42-43 (citing J.A.403 (statement at signing that "[w]e all know what that means"), J.A.506 (pre-inauguration statement that "[y]ou know my plans")). Attempting to glean official governmental purpose from such cryptic, offhand remarks requires precisely the type of "judicial psychoanalysis" *McCreary* forecloses. 545 U.S. at 862. Moreover, plaintiffs' belief that those statements reflect an intent to ban Muslim immigration is irrelevant because Section 2(c) actually does no such thing. It merely suspends temporarily the entry of certain aliens from six countries previously identified by Congress and the Executive as posing heightened terrorism-related risks.

## III. The Balance Of Equities Weighs Strongly Against Enjoining Section 2(c)

Plaintiffs deny that the government and the public suffered irreparable injury when the district court second-guessed the President's exercise of his unique constitutional role in making predictive national-security decisions. Pltfs. Br. 50-51; Gov't Br. 54-55. Plaintiffs suggest that enjoining the President's acts imposes less institutional injury than enjoining a State legislature's acts. But "irreparable injury" exists whenever the judiciary enjoins the enactments of "representatives of [the] people," regardless of whether those representatives are in the legislative or executive branch—indeed, the President represents the people of all 50 States, not just one. *See Maryland v. King*, 567 U.S. 1301, 1303 (Roberts, C.J., in chambers); *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). Plaintiffs further argue (Br. 50) that the "possibl[e]" effect of the injunction here is less injurious than the "concrete" effect of the injunctions in *New Motor Vehicle Board* and *King*. But those cases involved state laws concerning "the propriety of motor vehicle dealer relocations" and "removing violent felons from the population," whereas the Order here concerns potential terrorist entry into the country. Although plaintiffs and others may believe (Br. 50-51) that the national-security risk is insufficient to warrant Section 2(c)'s entry suspension, the President is entitled and obligated by the Constitution and Acts of Congress to weigh those risks himself and to strike a different balance than his predecessors if he deems it appropriate to protect national security.

Conversely, apart from their flawed theory that the Order imposes "condemnation" injury on all Muslims, plaintiffs do not meaningfully contend that they face *irreparable* injury from any potential temporary delay in the entry of their non-refugee relatives, clients, and members (even assuming such injury is judicially cognizable). Pltfs. Br. 49; Gov't Br. 53-54. At a minimum, therefore, any harm to plaintiffs from such delay is far outweighed by the terrorism-related concerns considered by the President, Secretary of Homeland Security, and Attorney General.

Balancing the respective interests, preliminary injunctive relief was clearly improper.

## IV. The District Court's Nationwide Injunction Is Improper

Plaintiffs fail to refute the multiple ways in which the injunction against Section 2(c) is overbroad. *First*, they do not defend the injunction's application to the President. They argue (Br. 54 n.24) that the Court need not decide that issue, but their own authority shows otherwise. The plurality in *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992), explained that, "[a]t the threshold, the [d]istrict [c]ourt should have evaluated whether injunctive relief against the President was available." *Franklin* ultimately did not decide whether relief against the President was available because an injunction against other officials would have redressed the plaintiffs' injuries. *Id.* Here, in contrast, the injunction's substantive scope is directly at issue.

*Second*, plaintiffs do not dispute that Section 2(c) cannot be enjoined wholesale unless they show that every application of it is unconstitutional. *See Croft v. Perry*, 624 F.3d 157, 164 (5th Cir. 2010) (applying no-set-of-circumstances test in rejecting facial Establishment Clause claim). They argue that "government action motivated by religious animus is unconstitutional in all its applications." Br. 52. But that is not true of Section 2(c): irrespective of its purpose, many of Section 2(c)'s applications cannot violate the Establishment Clause because those applications involve only aliens abroad who lack any rights under the Clause. By contrast, the cases plaintiffs cite involved domestic policies that directly applied only to U.S. persons with First Amendment rights. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313-15 (2000) (local school-prayer policy); *Awad*, 670 F.3d at 1127-28 (state constitutional amendment singling out Sharia law).

*Third*, plaintiffs fail to show that categorical, nationwide relief is necessary to redress any cognizable, irreparable injury to them. Plaintiffs never address *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001), which makes clear that, even if a law facially violates the First Amendment, injunctive relief must be limited to remedying concrete injuries to the plaintiffs. *Id.* at 392-94. Plaintiffs identify no concrete harm that relief limited to particular family members of individual plaintiffs would not redress. They allude (Br. 53) to harms to the organizational plaintiffs' clients and members, but they identify no specific client or member whose coverage under Section 2(c) cognizably injures plaintiffs, *supra* pp. 8-9; and if any such person existed, individualized relief also could address that injury.

*Fourth* and finally, plaintiffs claim (Br. 54) that sweeping relief is necessary to maintain uniform immigration law. But it would be far less disruptive to uniformity—and more respectful of the Constitution's allocation of authority over immigration to the political branches—to leave the Order's nationwide policy in place, with individualized exceptions for any particular persons who plaintiffs demonstrate suffer cognizable and irreparable injury. The Order's express severability clause, which plaintiffs do not address, compels that conclusion as a matter of law. Order § 15(a).

## CONCLUSION

For these reasons, the district court's preliminary injunction should be vacated. At a minimum, the case should be remanded with instructions to narrow the preliminary injunction to apply only as to individuals whom this Court holds have cognizable and irreparable injuries.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that this reply brief complies with the type-face requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-volume limitations of Rule 32(a)(7)(B). The reply brief contains 6,488 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(a)(7)(iii).

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## CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2017, I electronically filed the foregoing reply brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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